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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
09/332,863	06/15/99	IMPERIAL T	REV-99-10

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EXAMINER	
LIOTT,C	
ART UNIT	**PAPER NUMBER**
1751	

DATE MAILED: 07/05/00

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

Office Action Summary	Application No. 09/332,863	Applicant(s) Vergara et al.
	Examiner Caroline D. Liott	Group Art Unit 1751

☐ Responsive to communication(s) filed on _____.

☐ This action is **FINAL.**

☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

A shortened statutory period for response to this action is set to expire 3 month(s), or thirty days, whichever is longer, from the mailing date of this communication. Failure to respond within the period for response will cause the application to become abandoned. (35 U.S.C. § 133). Extensions of time may be obtained under the provisions of 37 CFR 1.136(a).

Disposition of Claims

☒ Claim(s) *1-20* is/are pending in the application.

Of the above, claim(s) _____ is/are withdrawn from consideration.

☐ Claim(s) _____ is/are allowed.

☒ Claim(s) *1-20* is/are rejected.

☐ Claim(s) _____ is/are objected to.

☐ Claims _____ are subject to restriction or election requirement.

Application Papers

☐ See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.

☐ The drawing(s) filed on _____ is/are objected to by the Examiner.

☐ The proposed drawing correction, filed on _____ is ☐approved ☐disapproved.

☐ The specification is objected to by the Examiner.

☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119

☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

☐ All ☐ Some* ☐ None of the CERTIFIED copies of the priority documents have been

☐ received.

☐ received in Application No. (Series Code/Serial Number) _____.

☐ received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

*Certified copies not received: _____.

☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

Attachment(s)

☒ Notice of References Cited, PTO-892

☒ Information Disclosure Statement(s), PTO-1449, Paper No(s). 2

☐ Interview Summary, PTO-413

☐ Notice of Draftsperson's Patent Drawing Review, PTO-948

☐ Notice of Informal Patent Application, PTO-152

--- SEE OFFICE ACTION ON THE FOLLOWING PAGES ---

Claims 5-20 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 5 is indefinite with regard to the term "use." A claim is indefinite where it merely recites a use without any active, positive steps delimiting how this use is actually practiced. Amending this term to read "application" can overcome this rejection.

Claim 5 is indefinite with regard to the term "aqueous based colorant composition" because it is unclear what this composition comprises. For example, is a colorant required? This term has been interpreted as requiring the presence of water and a colorant.

Claim 15 is indefinite for reciting a weight percent up to 300% because it is unclear how a weight percent can exceed 100%. Furthermore, the colorant composition cannot contain 100% of a silicone because a colorant and water are required. Clarification is required.

It is suggested that the term "(I)" in claim 5, part (a) be amended to read "(i)" so that it is consistent with parts "(ii)" and "(iii)," and with claim 18.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless --
>
> (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1-4 are rejected under 35 U.S.C. 102(b) as being anticipated by Hoyu.

Hoyu, JP 9-067,235, exemplifies a composition for bleaching hair which contains 11% by weight inorganic persulfates (including 9% by weight sodium persulfate), about 4.8% by weight hydrogen peroxide, and 1% by weight of a quaternary ammonium containing cellulose ether, which reads on the claimed cationic surfactant compounds, see provided CAPLUS Abstract. Hoyu, therefore, clearly anticipates compositions as claimed.

The intended use of a claimed composition is given little, if any, patentable weight. See *In re Albertson*, 141 USPQ 730 (CCPA 1964), and *In re Heck*, 114 USPQ 161 (CCPA 1957).

Claims 1-4 are rejected under 35 U.S.C. 102(a) as being anticipated by Goldwell.

Goldwell, DE 19721785, exemplifies a three part composition for simultaneously coloring and brightening hair, see provided CAPLUS Abstract and compositions A1, B1 and C in col. 6, line 1-col. 7, line 20. 6 grams of composition A1 is mixed with 6.25 grams of composition B1, 8.75 grams of composition C, and 20ml (20 grams) of water, see Example a) in col. 7, lines 24-33. The final composition contains 0.64% by weight of azo and phenazine cationic dyes, 8.85% by weight inorganic persulfate (including potassium persulfate), 1.28% by weight hydrogen peroxide, and 2.92% by weight of the cationic surfactant/compound hydroxypropyl guar trimmonium chloride. Goldwell, therefore, anticipates compositions as claimed.

Claims 1-14 and 16-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Goldwell.

Goldwell is relied upon above as exemplifying a three part composition for simultaneously coloring and brightening the hair, wherein the parts and mixed and applied to hair as claimed. Particularly, the first part, composition A1, is a colorant composition which comprises cationic dyes, a cationic surfactant, and a protein derivative (wheat protein hydrolyzate) as claimed in the claimed amounts, and humectants as claimed (PEG derivatives), see col. 6, lines 1-14. Goldwell teaches that the humectants may be present in the claimed amounts, see col. 3, lines 42-45. This composition appears to have a pH as claimed because it does not contain any strong acids or bases. The second part, composition B1, is powdered and comprises ammonium and potassium persulfate and particulate fillers (e.g. pyrogenic silica) in the claimed amounts, and an inorganic colorant (magnesium oxide), see col. 6, lines 30-53. The magnesium peroxide may be present in

the claimed inorganic colorant amounts, see col. 4, lines 50-54. The third part, composition C, comprises hydrogen peroxide, water and an oily phase (cetyl stearyl alcohol) in the claimed amounts, see col. 7, lines 10-20. As explained above, the three compositions are mixed with 20ml of water, wherein the final composition has a pH as claimed, and is applied to the hair for the claimed times, followed by rinsing, see col. 7, lines 24-33. The compositions may be mixed in the claimed amounts, see Example a) relied upon above and col. 5, lines 14-32. Although Goldwell does not appear to teach the addition of film-forming polymers to the aqueous developer solution as claimed, the patentee teaches the addition of such polymers in the claimed amounts to the colorant-containing composition, see col. 2, lines 6-12 and col. 3, lines 46-51. Goldwell does not exemplify a method as claimed. Particularly, the patentee does not appear to specifically teach water-containing colorant compositions as claimed.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to formulate a powdered persulfate-containing-, aqueous developer-, and colorant-composition as claimed, wherein each composition contains each claimed component in the claimed amounts at the claimed pH's, and wherein the compositions are mixed in the claimed amounts to form a final mixture with a pH as claimed which is applied to the hair in highlighting and coloring methods as claimed, because such compositions and methods fall within the scope of those as taught by Goldwell. Optimization of proportions, mixing ratios and pH would have been obvious to those skilled in the art in order to obtain the most effective dyeing results, absent a showing otherwise. Although Goldwell does not appear to teach aqueous colorant compositions,

the patentee's colorant composition is mixed with water before application to the hair, therefore forming a final aqueous composition which reads on the those as claimed. The Office holds the position that because Goldwell's processes result in the application of the same components as claimed in the claimed amounts at the claimed pH's, Goldwell's processes are not patentably distinct from those as claimed, absent a showing otherwise.

Claims 1-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Goldwell as applied to claims 1-14 and 16-20 above, and further in view of Yoshihara.

Goldwell is relied upon above as teaching compositions and methods for coloring and highlighting the hair as claimed, wherein cationic direct dyes may be used as the colorants. The patentee does not appear to teach the addition of silicones to the colorant compositions as claimed.

Yoshihara, U.S. Patent No. 5,332,581, teaches keratinous fiber treating compositions which are preferably formulated as hair coloring compositions which contain direct dyes, wherein preferred direct dyes include cationic or basic direct dyes, see Abstract and col. 3, lines 12-19 and col. 4, lines 3-11. Yoshihara teaches that silicones are preferably added to the compositions in the claimed amounts in order to improve the texture of the hair, see col. 4, line 64-col. 5, line 19.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to add a silicone in the claimed amounts to Goldwell's colorant compositions because Yoshihara teaches that the addition of such silicones in the claimed amounts to hair colorant compositions, including those which may contain basic dyes, results in improved hair texture.

A translation of Goldwell has been ordered.

Claims 5-8, 11 and 18-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Henkel.

Henkel, DE 2,624,690, teaches a three part blonding mixture for hair, see provided CAPLUS Abstract. The first part comprises an aqueous solution of a mixture of dyes, one of which is a cationic dye as claimed (Brilliant Blue R 28032) in the claimed amounts, see Abstract and Example 1. The second part comprises a 6% aqueous solution of hydrogen peroxide, and the third part comprises solid (i.e. powdered) ammonium persulfate, see Abstract and Example 1. The solid persulfate-containing composition may also contain fillers in the claimed amounts, including those which read on the claimed inorganic colorants, see page 5, paragraph 2 and Example 2. Henkel teaches the equivalence between ammonium and sodium and potassium persulfate as claimed, wherein the persulfate may be present in the solid composition in the claimed amounts, see page 5, first paragraph and Example 2. The persulfate, developer and colorant compositions are mixed in the claimed amounts, and are applied to hair for the claimed times followed by rinsing, see Abstract and Example 1. The final mixture appears to have a pH as claimed due to the presence of ammonia in the colorant composition. Furthermore, Henkel teaches pH's as claimed, see page 5, paragraph 3. Henkel's methods appear to result in coloring and highlighting results as claimed because they comprise each claimed component in the claimed amounts. Henkel does not exemplify a method as claimed, particularly which uses an alkali or alkaline earth metal persulfate.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to formulate a powdered persulfate composition, an aqueous hydrogen peroxide solution, and an aqueous colorant composition which contains a cationic dye, wherein each composition contains the claimed components in the claimed amounts, and wherein the compositions are mixed in the claimed amounts and applied to hair in methods as claimed, because such compositions and methods fall within the scope of those as taught by Henkel. Particularly, it would have been obvious to those skilled in the art to substitute the ammonium persulfate in Henkel's Example 1 with an alkali metal persulfate (e.g. sodium or potassium) as claimed, and to add fillers and inorganic colorants to the solid persulfate composition, because Henkel teaches the equivalence between these persulfates, and teaches such additives as appropriate for the patentee's composition, absent a showing otherwise.

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Particularly note the following:

L'Oreal, U.S. Patent No. 6,045,591 and EP 920,856, teaches a two-step process for coloring the hair wherein the first step comprises bleaching the hair with powdered persulfate and aqueous hydrogen peroxide compositions, and the second step comprises coloring the hair with basic dyes.

Goldwell, DE 3,814,685 and GB 2,217,735, teaches methods for highlighting and coloring hair with two-component compositions wherein the first part is powdered and may contain

persulfate and basic dyes, and the second part comprises an aqueous hydrogen peroxide solution, and wherein the two components are mixed before application to the hair.

JP 1-175,925, teaches a method for coloring hair by mixing an aqueous colorant composition with an aqueous hydrogen peroxide solution and a powdered ammonium persulfate composition.

Applicant is reminded that if any evidence is to be presented in accordance with 37 CFR 1.131 or 1.132, such evidence should be presented before final rejection in order to be considered timely.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Caroline Liott whose telephone number is (703) 305-3703. The examiner can normally be reached on Mondays-Thursdays from 8:30am to 6:00pm, and on alternate Fridays.

If attempts to reach the examiner are unsuccessful, the examiner's supervisor, Yogendra Gupta, can be reached at (703)308-4708. All before final official faxes should be sent to (703) 305-7718. All after final official faxes should be sent to (703) 305-3599. All non-official faxes should be sent to (703) 305-6078.

Any inquiry of a general nature should be directed to the Group receptionist whose telephone number is (703) 308-0661.

C.D.L.
June 30, 2000

Caroline D. Liott

CAROLINE D. LIOTT
PRIMARY EXAMINER